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No. 79-1074

In the Supreme Court of the United States

OCTOBER TERM, 1979

UNITED PARCEL SERVICE, INC., ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE FEDERAL RESPONDENTS IN OPPOSITION

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A45-A54) is reported at 612 F.2d 277. The opinion of the Interstate Commerce Commission (Pet. App. A21-A44) is reported at 127 M.C.C. 292.

JURISDICTION

The judgment of the court of appeals was entered on October 30, 1979. The petition for a writ of certiorari was filed on January 9, 1980. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether the Interstate Commerce Commission correctly determined that petitioner United Parcel Service of America, Inc., a non-carrier holding company, would "acquire control" of a carrier and therefore become subject to regulation under 49 U.S.C. 11348 (a), if its two motor carrier subsidiaries merged pursuant to 49 U.S.C. 11343(a).

STATUTES INVOLVED

49 U.S.C. 11343(a) (formerly Section 5(2)(a) of the Interstate Commerce Act)[1] provides in pertinent part:

> (a) The following transactions involving carriers providing transportation subject to the jurisdiction of the Interstate Commerce Commission under subchapter I (except a pipeline carrier), II, or III of chapter 105 of this title may be carried out only with the approval and authorization of the Commission:
>
> (1) consolidation or merger of the properties or franchises of at least 2 carriers into one corporation for the ownership, management, and operation of the previously separately owned properties.
>
> * * * * *
>
> (4) acquisition of control of at least 2 carriers by a person that is not a carrier.

[1] The Interstate Commerce Act has been revised, codified, and reenacted, without substantive change, as subtitle IV of Title 49 of the United States Code. Act of October 17, 1978, Pub. L. No. 95-473, 92 Stat. 1337 *et seq.*

> (5) acquisition of control of a carrier by a person that is not a carrier but that controls any number of carriers.
>
> * * * * *

49 U.S.C. 11348 (formerly Section 5(4) of the Act) provides in pertinent part:

> (a) When the Interstate Commerce Commission approves and authorizes a transaction * * * in which a person not a carrier providing transportation subject to the jurisdiction of the Commission under chapter 105 of this title acquires control of at least one carrier subject to the jurisdiction of the Commission, the person is subject, as a carrier, to the following provisions of this title that apply to the carrier being acquired by that person, to the extent specified by the Commission: section 10764, subchapter III of chapter 111, and sections 11301, 11302, 11709, 11711, 11901(f), (h)(1), 11909(a)(1), (b), and 11911(a).

STATEMENT

Petitioner United Parcel Service of America, Inc. (UPS-A) is a holding company with predominantly transportation interests. It owns all the outstanding stock of the other two petitioners—United Parcel Service, Inc. (UPS-NY), a New York corporation that operates as a motor common carrier in 13 Middle Atlantic and New England states, and United Parcel Service, Inc. (UPS-OH), an Ohio corporation that operates as a motor common carrier in the remaining 35 contiguous states (Pet. App. A4-A5, A46). UPS-A also controls several other motor carrier subsidiaries offering retail delivery services in Pennsylvania, Flor-

ida, and Virginia, as well as an air freight forwarder and a bonded messenger service (Pet. App. A3). In 1974 the revenues of the interstate carrier subsidiaries of UPS-A, including UPS-NY and UPS-OH, exceeded $1.25 billion (*id.* at A14).

UPS-A is not currently subject to Commission regulation, despite its significant nation-wide transportation interests. This unregulated status is a result of the holding company's having obtained control of its two regulated carrier subsidiaries (UPS-NY and UPS-OH) prior to the effective date of the Motor Carrier Act of 1935.

The instant controversy originated when UPS-A, UPS-NY, and UPS-OH joined in an application to the Commission for authority to merge UPS-NY into UPS-OH. The application was filed under 49 U.S.C. 11343(a), which provides that certain types of transactions involving regulated carriers—including the "acquisition of control of a carrier by a person that is not a carrier but that controls any number of carriers"—may be carried out only with the approval and authorization of the Commission. In its application UPS-A, along with the two subsidiaries, requested "authority to *control* the operating rights and property sought to be acquired" through the proposed transaction (App. 1a) (emphasis added).[2]

UPS-A and its subsidiaries stated in their application that the purpose of the proposed transaction was "corporate simplification" (App. 10a). This explana-

[2] "App." refers to the joint appendix filed in the court of appeals.

tion was expanded in the verified statement of an officer of UPS-OH and UPS-NY (App. 20a):

> Upon completion of the proposed merger, there will be only one I.C.C. regulated carrier, in place of two. This will simplify the corporate and accounting work, and reduce the number of filings required by the I.C.C. and other regulatory agencies. The economies in administration and regulation resulting from this corporate simplification are apparent.
>
> The present joint line service between the two subsidiaries will be one single line service.

In addition, UPS-A told the Commission that the merger would "simplify" the holding company's "corporate accounting and reporting work" (Pet. App. A27).

The Commission approved the proposed merger (Pet. App. A21-A44). At the same time, however, the Commission ruled that because UPS-A would "acquire control" of the merged entity, it would lose its unregulated status and become a "carrier" within the meaning of Section 11348, which applies to any person who with Commission approval "acquires control" of a regulated carrier. Under Section 11348, persons acquiring such control become subject to various regulatory requirements "to the extent specified by the Commission." Here, in light of the transportation orientation of the holding company's business and the large size and scope of its operations (Pet. App. A14, A29), the Commission decided that it would apply the several regulatory provisions enumerated in Section 11348 to UPS-A if the merger were consummated.

The Commission rejected the contention of UPS-A that because the holding company already owned the two subsidiaries, it would not "acquire control" over the merged entity, within the meaning of Sections 11343(a) or 11348. In ruling that the proposed transaction involved an acquisition of control by the holding company, the Commission relied on this Court's decision in *Alleghany Corp.* v. *Breswick & Co.*, 353 U.S. 151, 169 (1957), which holds that the "crux" of the inquiry in such cases is whether the transaction would result in a "significant increase" in the power of the non-carrier over a carrier, such as "an increased voice in management or operation, or the ability to accomplish financial transactions or operational changes with greater legal ease." Applying that standard, the Commission concluded that "the transaction will allow UPS-A to accomplish financial transactions or operational changes with greater legal ease, as UPS-A itself contemplates, and thus will result in an acquisition of control on the part of UPS-A" (Pet. App. A27).

The court of appeals carefully reviewed the Commission's decision and held that the agency was justified in finding that the approved transaction involved an "acquisition of control" by UPS-A within the meaning of Sections 11343(a) and 11348 (Pet. App. A53). The court stated that the "conclusions of the Commission are warranted by the facts on the basis of the *Alleghany* standards and principles" (*id.* at A51).

ARGUMENT

1. The court of appeals, relying on this Court's decision in *Alleghany*, properly sustained the Commission's determination that UPS-A would "acquire control" of the merged entity in the proposed transaction and would thereby become subject to agency regulation as a carrier. Under *Alleghany*, whether a given transaction entails an "acquisition of control" depends not upon labels but upon the nature of the proposed change in relations between the companies involved. 353 U.S. at 166, 169. As indicated above, the "crux" of the inquiry is whether, as a practical matter, the transaction would result in a "significant increase" in the power of one entity over another, such as "an increased voice in management or operation, or the ability to accomplish financial transactions or operational changes with greater legal ease." *Ibid.* The Court noted in *Alleghany* that, in conducting this inquiry, the courts should defer to the Commission's findings, so long as there is "warrant in the record for the judgment of the expert body." *Ibid.*, quoting *Rochester Telephone Corp.* v. *United States*, 307 U.S. 125, 146 (1939). See also *Gilbertville Trucking Co.* v. *United States*, 371 U.S. 115, 125, 126 & n.8 (1962). Here, the court of appeals appropriately deferred to the Commission's finding that the merger would involve an "acquisition of control" by UPS-A, after it determined that the agency's assessment was "warranted by the facts" (Pet. App. A51).

Petitioners dispute the Commission's finding that the merger would significantly increase the power of

UPS-A over its subsidiaries and assert that mere "paper changes" are involved (Pet. 17). But as the court of appeals pointed out (Pet. App. A50-A51), petitioners' own representations to the Commission extolling the benefits to be derived from the merger provided a sound basis for the Commission's determination that the proposal would allow UPS-A to "accomplish financial transactions or operational changes with greater legal ease" and thus "acquire control" under the *Alleghany* standard.

The court of appeals correctly rejected (Pet. App. A51-A52) petitioners' claim—which they renew here (Pet. 21-23)—that *Alleghany* is inapplicable because the instant case is factually distinguishable. In *Alleghany* the Court found an "acquisition of control" by a non-carrier holding company in the merger of two members of a vertical chain of carrier subsidiaries (*i.e.*, the merger of a farther removed subsidiary into a more proximate one). This case, by contrast, involves the merger of one wholly owned subsidiary into another. Contrary to petitioners' contentions, however, the somewhat different corporate relationship here does not require a conclusion different from that reached in *Alleghany*. As the court below observed (Pet. App. A52), this Court in *Alleghany* considered the "immediacy or remoteness of the parent from the proposed transaction" to be immaterial (353 U.S. at 169). Similarly, although petitioners emphasize that both subsidiaries involved in this case are 100% owned by the holding company, the subsidiaries in *Alleghany* were also wholly owned by the

parent company through means of the vertical chain (see Pet. App. A52).

2. Alternatively, petitioners assert that *Alleghany* was wrongly decided and should be overturned by this Court as "bad law" (Pet. 18). That contention is without merit. Far from exalting form over substance as petitioners allege, *Alleghany* establishes a pragmatic standard that focuses on whether, as analyzed by the Commission with its expertise, a given transaction will actually enhance to a significant degree the power that one entity has over another. Eliminating that flexible test and substituting a rigid *per se* rule that precludes a finding of acquisition of control by a parent when subsidiaries are merged would be a definite step backward that could frustrate the public need—which Congress recognized in enacting the Interstate Commerce Act—for Commission regulation of certain non-carrier holding companies with extensive transportation operations.

In short, the principle established in *Alleghany*—that the practical realities of a transaction rather than its form should govern—is correct and should not be overruled. We submit that the Commission correctly applied that principle to the particular facts of this case, but that is a separate question that does not warrant this Court's review in any event.

3. Finally, the issue posed by the petition is not of substantial or recurring importance because it derives from the unusual circumstance that UPS-A acquired both subsidiaries before the advent of motor carrier regulation in the 1930's. If the holding com-

pany had acquired either subsidiary within the past 45 years, it would already have been subject to Commission regulation and the instant controversy would not have arisen. Because similar cases are thus unlikely to arise, review here is especially unwarranted.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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